United States Court of Appeals

for the Second Circuit

REPLY BRIEF

No. 76-4011

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL UNION NO. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JAY E. SHANKLIN,
ALAN HYDE,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-5537

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Respondent Teamsters' Union relies heavily (Br. 14-20, 21, 27, 29, 32) on the Ninth Circuit's decision in *N.L.R.B. v. International Longshoremen's and Warehousemen's Union, Local 50*, 504 F.2d 1209 (1974), cert. denied *sub nom. International Union of Operating Engineers, Local 701 v. International Longshoremen's & Warehousemen's Union etc.*, 420 U.S. 973, pending before the Board on remand. That decision, however, has no application here because the factors on which the court relied there are not present in the instant case. Moreover, the instant case illustrates the need for the multifaceted approach used by the Board and questioned by the Ninth Circuit in *Local 50*.

The *Local 50* court's decision turned in major part upon its view that the contract between the employer and the Longshoremen's union was "the only applicable collective bargaining agreement." 504 F.2d at 1222, 1216. Because that contract had been construed in an arbitration between the Longshoremen's union and the employer as assigning the disputed work to the longshoremen, the court concluded that only these employees had a contractual claim to the work. *Ibid.* Consequently, the court found that the dispute there "does not involve an employer caught in the cross fire between two unions with which the employer has contracts." *Id.* at 1216. The situation here is entirely different. Hertz has collective bargaining agreements with both unions, both of which "contain language which could cover the work in dispute" (A. 16-17). But, as the Board found, the Machinists' agreement "more precisely provides for coverage of the disputed work" of servicing nonmilk trucks, which is the only work at issue here (*ibid.*). See Board's main brief, pp. 11-12.[1]

The second factor which the Ninth Circuit viewed as significant — an expression of preference by the employer (504 F.2d at 1216) — is also absent here. Hertz has explicitly declined to state a preference as to which union's employees should be assigned the nonmilk truck work. Board's main brief at 6, 10-11. Moreover, as the Board has noted, "an employer's assignment of disputed work cannot be made the touchstone in deciding a jurisdictional dispute" because "to do so would be a reversion

[1] Contrary to Teamsters' assertion (Br. 15), the *Local 50* court did not "return. . . the work to the Longshoremen", but remanded the case to the Board and recognized that, even in the light of the court's views, the Board might still find that the Engineers should get the work. 504 F.2d at 1221. The Court added that the Board "may still evaluate each jurisdictional dispute on its own merits and it need not be limited by a rigid set of standards or principles." *Ibid.*

to Board practice explicitly rejected by the Supreme Court in the *CBS* decision [364 U.S. 574]." *Millwrights Local Union 1102 (Don Cartage Co.)*, 160 NLRB 1061, 1078 (1966). Thus, the principles postulated by the court in *Local 50* simply have no relevance to this case.

Here, as shown in the Board's main brief, pp. 10-13, many of the factors usually relied upon by the Board were either inapplicable or in balance, and the Board was confronted with the necessity of making a decision on the basis of the only two factors presenting significant differences between the unions: the contracts, discussed above, and Hertz's past practice. Teamsters argue (Br. 22-23, 25, 27) that the only relevant past practice is that at the Holland dairy and other "milk account locations." But there is no evidence that *nonmilk* trucks are, or have been, serviced at milk locations other than Holland; and this contention ignores the fact that the work in dispute here involves exclusively nonmilk trucks, such as furniture and moving vans (A. 34). They are leased to customers not connected with the milk industry and are to be serviced in a "full-fledged maintenance garage," physically separated from Holland's garage (A. 6; 35, 103-104). Thus, the Board could properly deem Hertz's practice with respect to the servicing of nonmilk trucks as the relevant practice in the circumstances of this case.

CONCLUSION

For the foregoing reasons, as well as those stated in the Board's opening brief, it is respectfully submitted that a judgment should issue enforcing the Board's order in full.

JAY E. SHANKLIN,
ALAN HYDE,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Cohen, Weiss & Simon
Att: Bruce Simon, Esq.
Rosalind A. Kochman
605 Third Avenue
New York, New York 10016

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 8th day of April, 1976.